

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
)  
WESTERN WIRELESS CORPORATION )  
Petition For Designation as an )  
Eligible Telecommunications Carrier for the )  
Pine Ridge Reservation in South Dakota )  
)  
Federal-State Joint Board on Universal Service )  
)

CC Docket No. 96-45

**WESTERN WIRELESS REPLY COMMENTS**  
**ON PETITION FOR DESIGNATION AS AN**  
**ELIGIBLE TELECOMMUNICATIONS CARRIER**

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March 26, 2001

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## EXECUTIVE SUMMARY

The Commission should grant the petition filed by Western Wireless Corporation's subsidiary, WWC License, LLC ("Western Wireless"), for designation as an eligible telecommunications carrier ("ETC") for its provision of universal service on the Pine Ridge Indian Reservation in South Dakota under the Tate Woglaka Service Agreement between Western Wireless and the Oglala Sioux Tribe (the "Tate Woglaka Offering"). Western Wireless and the Oglala Sioux Tribe crafted the Tate Woglaka Offering as a special, joint universal service undertaking in response to the Commission's recent initiatives directed toward improving telephone service penetration on tribal lands, such as the Pine Ridge Reservation, where the rate is well below the national 94% average. Western Wireless and the Oglala Sioux Tribe have already commenced efforts to make the Tate Woglaka Offering available, and over 1,000 residents of the Pine Ridge Reservation – 42% of whom previously lacked telephone service – have already enrolled. However, Western Wireless is currently receiving no federal support for providing this universal service package, so ETC designation is critical given the high-cost nature of the offering and the Pine Ridge service area.

The Commission should find that the Tate Woglaka Offering satisfies the criteria for ETC designation in Section 214(e)(6) and the FCC's rules, and that the comments opposing the Pine Ridge ETC Petition are without merit. First, the Petition is properly before the Commission. The FCC has authority to designate

Western Wireless as an ETC for the Pine Ridge Reservation under Section 214(e)(6) of the Act, because the South Dakota Public Utilities Commission (“SDPUC”) lacks jurisdiction. The lack of SDPUC jurisdiction results from the characteristics of the Tate Woglaka Offering, including the largely tribal-member customer base, the fact that the offering is geographically limited to the Reservation, and the Oglala Sioux Tribe’s role in overseeing the offering. The opposing commenters misapply federal Indian law principles and FCC precedent by failing to recognize that the balance of state versus federal/tribal interests clearly favors FCC designation. Moreover, Western Wireless’ pending ETC petition for its state-wide provision of universal service in South Dakota does not preclude an FCC designation here due to the jurisdictionally significant differences between the Tate Woglaka Offering and Western Wireless’ other service packages.

Second, the Commission has already found that Western Wireless satisfies the substantive ETC criteria, and granting ETC status for the provision of the Tate Woglaka Offering advances the public interest. The Tate Woglaka Offering is specially designed to help improve tribal telephone penetration rates, provide new technological solutions to the high cost of service, and to bring the benefits of competition to the Reservation. The opposing commenters have failed to offer any evidence specific to their Pine Ridge Reservation service areas to overcome the FCC’s rejection of a general finding that rural areas cannot support competitive ETCs.

Finally, the Commission can designate Western Wireless as an ETC for its Pine Ridge Reservation service area, notwithstanding that the study areas of the incumbent rural ILECs extend beyond the Reservation's boundaries. The Commission can reasonably harmonize Section 214(e)(5) and Section 214(e)(6) by designating Western Wireless in rural ILEC study areas only to the extent of the FCC's authority, *i.e.*, within the Reservation's exterior boundaries. In the alternative, the Commission could forbear from enforcing the Section 214(e)(5) requirement that Western Wireless serve the whole of these carriers' study areas.

The Commission should therefore expeditiously grant the requested ETC designation for Western Wireless' Tate Woglaka Offering on the Pine Ridge Reservation.

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**WESTERN WIRELESS REPLY COMMENTS**  
**ON PETITION FOR DESIGNATION AS AN**  
**ELIGIBLE TELECOMMUNICATIONS CARRIER**

The Commission should grant the petition filed by Western Wireless Corporation's wholly-owned subsidiary, WWC License, LLC ("Western Wireless"), for designation as an eligible telecommunications carrier ("ETC") for its universal service offering on the Pine Ridge Reservation in South Dakota. 1/ As demonstrated in the Petition and herein, Western Wireless' new universal service offering, which it provides under the Tate Woglaka Service Agreement (the "Tate Woglaka Offering"), meets the ETC criteria in 47 U.S.C. § 214(e)(6) and in the FCC's rules. 2/ The Tate Woglaka Offering, which provides basic telecommunications services

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1/ *In the Matter of Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, CC Docket No. 96-45, Public Notice, DA 01-278 (rel. Feb. 2, 2001) (soliciting comment on Western Wireless' Petition for Designation as an ETC for the Pine Ridge Reservation ("Pine Ridge Petition" or "Petition")).

2/ 47 C.F.R. §§ 54.101, *et seq.*

uniquely targeted toward improving the unacceptably low telephone penetration rate on the Reservation, is subject to tribal rather than state jurisdiction, thereby giving the FCC authority over the requested ETC designation.

## I. INTRODUCTION

The Tate Woglaka Offering is a special universal service package created as a joint effort by Western Wireless and the Oglala Sioux Tribe of South Dakota's Pine Ridge Indian Reservation, in response to the Tribe's need for improved telecommunications services on the Reservation, and this Commission's trilogy of decisions seeking to improve generally the state of basic telephone service on tribal lands across the country. <sup>3/</sup> Western Wireless provides the Tate Woglaka Offering using its existing cellular network, which has become a generally accepted vehicle for providing universal service, <sup>4/</sup> to offer competitive basic telephony to an

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<sup>3/</sup> *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207 (rel. June 23, 2000) ("Tribal Policy Statement"); *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, 15 FCC Rcd 12208 (2000) ("Twelfth Report and Order"); *Extending Wireless Telecommunications Services To Tribal Lands*, WT Docket No. 99-266, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 11794 (2000) ("Wireless Tribal Lands Order"). The Commission, less than a week before the date of this filing, took additional steps in this effort. See *FCC Announces Two Conferences to Enhance Telecommunications Services in Indian Country*, News Release (rel. March 20, 2001) ("Tribal Telecom Conference News Release").

<sup>4/</sup> See *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, CC Docket No. 96-45, Memorandum Opinion and Order,

[footnote continues]



underserved Indian Reservation. 5/ Western Wireless provides the over 1,000 Tate Woglaka customers that have already enrolled in the offering with wireless local loop customer premises equipment (“WLL CPE”) that they use, in conjunction with standard telephone handsets and peripheral devices, to access Western Wireless’ cellular network in the same manner as handheld cellular phones. 6/ The Tate Woglaka Offering is provided for a \$14.99 a month flat fee, which includes the cost of using the WLL CPE.

The Tate Woglaka Offering represents a win-win-win situation for the Oglala Sioux Tribe, Western Wireless and the Commission. In the spirit of the trilogy of FCC tribal telecommunications decisions, Western Wireless and the Tribe worked together to negotiate and execute the Tate Woglaka Service Agreement and the implementation of a Telecommunications Services Plan for basic and enhanced services. 7/ Under the Agreement, the Oglala Sioux Tribe participates in developing and promoting Western Wireless’ new competitive service on the Reser-

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DA 00-2896 (rel. Dec. 26, 2000) (“*Wyoming ETC Order*”); *see also* Petition at 2 n.2 (reciting Western Wireless’ ETC designations in 11 states and pending petitions).

5/ *Cf.*, *Twelfth Report and Order*, 15 FCC Rcd at 12272-73, ¶¶ 138-40 (discussing Western Wireless Petition for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service to the Crow Reservation in Montana, filed Aug. 4, 1999 (“Crow ETC Petition”)); *see also* Jurisdictional Supplement to Crow ETC Petition, filed by Western Wireless, October 2, 2000 (making jurisdictional showing).

6/ *See* Petition at 6-7, n.9 & Appendix D.

7/ *See id.* at 4-5.

vation, exercises regulatory oversight of the offering under tribal law, and receives the benefits of new revenue, training and employment opportunities. 8/ Western Wireless enjoys tribal input in designing a universal service offering fashioned to meet the needs of its target market, and enjoys the Tribe's assistance in interfacing with its members, who make up the Tate Woglaka Offering's customer base. 9/ And the Commission realizes the benefit of seeing the promise of its trilogy of tribal telephone orders and other tribal-related efforts fulfilled.

To date, the Tate Woglaka Offering is meeting and exceeding the Tribe's and Western Wireless' expectations. As noted above, over 1,000 customers have signed up for the service. Of these, 42% previously had no telephone service whatsoever. Western Wireless recently obtained FCC approval to expand its cellular operations on the Reservation to reach further into underserved areas. 10/ Pending designation as an ETC on the Pine Ridge Reservation, Western Wireless is providing service under the Tate Woglaka Offering without universal service

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8/ *Id.* at 4-6, 14-15.

9/ This is anything but an insubstantial benefit. As the Commission has recognized, understanding "tribal priorities, . . . how to work with tribal governments, tribal sovereignty, . . . and community protocols and concerns as they relate to building telecommunications . . . infrastructure and markets" requires special insight that is not necessarily instinctive for those in the marketplace. *See Tribal Telecom Conference News Release, supra* note 3.

10/ *See id.* at 7 & n.10.

support. 11/ At present, the net cost to Western Wireless of doing so substantially exceeds the monthly revenues it receives from subscribers. More importantly, Western Wireless is unable to expand its offering to the more remote areas of the Reservation, areas that are largely unserved by wireline technology. Additionally, without universal service support, Western Wireless is unable to provide the Tate Woglaka Offering at the \$1.00 monthly rate for qualifying low-income Pine Ridge residents contemplated by the Commission. 12/ Western Wireless' designation as an ETC, which would allow it to qualify for both basic universal service support and support under the new tribal universal service mechanisms created in the *Twelfth*

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11/ Western Wireless petitioned for ETC designation in South Dakota for its Wireless Residential Service ("WRS") universal service offering throughout the state, but the South Dakota Public Utilities Commission ("SDPUC") denied that request. See Petition at 2 n.2, 17-19 (discussing history of Western Wireless ETC designation effort in South Dakota). This denial has been reversed on appeal, and the reversal has been upheld by the South Dakota Supreme Court, *Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier*, Findings of Fact, Conclusions of Law, and Order, Civ. 99-235 (SD Sixth Jud. Cir. March 22, 2000), *aff'd*, 2001 WL 256382 (SD March 14, 2001); *Cf.*, *Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, 15 FCC Rcd 15168 (2000) (finding SDPUC rationale for denying Western Wireless' ETC petition invalid under Sections 214(e) and 253 of the Act, 47 U.S.C. §§ 214(e) and 253) ("*ETC Declaratory Ruling*"). However, Western Wireless has yet to be designated in the rural areas of South Dakota, including the Pine Ridge Reservation. In any event, as discussed in the Petition and herein, the Tate Woglaka Offering on the Pine Ridge Reservation is distinct from Western Wireless' WRS universal service offering available throughout South Dakota, so designation by the FCC is required. See Petition at 17-19, *infra* Section II.B.

12/ *Twelfth Report and Order*, 15 FCC Rcd at 12230-35, ¶¶ 42-52.

*Report and Order*, is therefore of the utmost importance to the Tribe and Western Wireless.

Notwithstanding the success of the Tate Woglaka Offering, and the general benefits conferred on the Oglala Sioux Tribe and the underserved residents of the Pine Ridge Reservation, the SDPUC and certain rural incumbent local exchange carriers (“ILECs”) have filed comments urging this Commission to dismiss or deny Western Wireless’ Pine Ridge Petition. These commenters oppose the efforts of Western Wireless and the Oglala Sioux Tribe to qualify for the essential federal support needed to improve the state of telecommunications on tribal lands through new universal service offerings. The SDPUC and the rural ILECs raise the unfounded arguments that Western Wireless should request ETC status for Pine Ridge from the SDPUC rather than the FCC, that the Commission cannot exercise its Section 214(e)(6) jurisdiction because the rural ILECs serve territory outside the Reservation, and that the public interest would be disserved by providing universal service support for the Tate Woglaka Offering. <sup>13/</sup> The Commission should reject these misguided efforts and instead grant Western Wireless ETC status so it and

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<sup>13/</sup> The SDPUC’s comments purport to address only the jurisdictional issues and to take no position on whether Western Wireless meets the ETC criteria or whether designation is in the public interest. SDPUC at 2. However, given the SDPUC’s consistent opposition to Western Wireless’ attempts to provide universal service, including a willingness to take the case all the way to the state Supreme Court, *see supra* note 11, we believe that an FCC order directing Western Wireless to seek designation from the SDPUC would inevitably lead to a denial and would result in the end of the Tate Woglaka Offering.

the Oglala Sioux Tribe can obtain the federal support designed to advance efforts such as the Tate Woglaka Offering.

## **II. THE FCC HAS JURISDICTION TO DESIGNATE WESTERN WIRELESS AS AN ETC FOR THE PINE RIDGE RESERVATION**

The Commission should reject claims by the opposing commenters that the FCC lacks authority to designate Western Wireless as an ETC for the Pine Ridge Reservation. Neither the unsupported claim that the SDPUC has jurisdiction over the Tate Woglaka Offering nor Western Wireless' pending state-wide ETC petition before the SDPUC deprives the FCC of jurisdiction. As we demonstrate below, the Tate Woglaka Offering is subject to tribal – not state – jurisdiction, so the Section 214(e)(6) jurisdictional threshold is met. In addition, the *Twelfth Report and Order's* prohibition on a carrier filing an ETC petition for tribal lands under Section 214(e)(6), when it has already petitioned for state commission designation, does not apply here because the Tate Woglaka Offering differs in a jurisdictionally significant manner from Western Wireless' universal service and other wireless offerings outside the Reservation.

### **A. The Tate Woglaka Offering is Not Subject to the SDPUC's Jurisdiction**

The Commission has authority under Section 214(e)(6) to designate Western Wireless as an ETC for its provision of the Tate Woglaka Offering on the Pine Ridge Reservation. As set forth in the *Pine Ridge Petition*, determining whether the FCC has such jurisdiction turns on whether the SDPUC or the Oglala

Sioux Tribe has jurisdiction over the Tate Woglaka Offering – if the Tribe has jurisdiction, the state lacks jurisdiction and FCC designation is appropriate. <sup>14/</sup> The Pine Ridge Petition demonstrates that determining whether the state or the Tribe has jurisdiction over the Tate Woglaka Offering requires the Commission to balance state and tribal interests, and the commenters who address the issue essentially agree. <sup>15/</sup> Notably, the SDPUC concurs in this approach. <sup>16/</sup> As we show in the Pine Ridge Petition and in this Section II.A, such balancing clearly favors a finding of tribal jurisdiction and a determination that the Commission has jurisdiction to grant the instant Petition.

**1. The Balancing of Tribal and State Interests Favors  
FCC Jurisdiction Over the Tate Woglaka Offering**

The Petition demonstrates that the balancing of interests under applicable federal Indian law favors the Oglala Sioux Tribe, and not the SDPUC, as having jurisdiction over the Tate Woglaka Offering. This showing is based on the following critical factors:

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<sup>14/</sup> Petition at 7-16.

<sup>15/</sup> Insofar as Great Plains argues that “the Commission does not have authority to ‘balance’ these interests, but must find specifically a lack of state jurisdiction through a ‘particularized inquiry,’” Great Plains at 5, Great Plains clearly misunderstands that the balancing test *is* the mechanism by which “particularized inquiry” is made. See Petition at 10-16.

<sup>16/</sup> See SDPUC at 9-20; *see also* Cellular Telecommunications & Internet Association at 2 (“CTIA”).

- The Tate Woglaka Offering is available only within the Pine Ridge Reservation;
- Over 90% of Pine Ridge Reservation residents are Native Americans;
- The vast majority of Reservation land is either owned by, or held by the federal government in trust for, the Tribe and its members;
- The Tate Woglaka Offering is governed by the Oglala Sioux Tribe's legal jurisdiction;
- There is no treaty or other legal document in which the Oglala Sioux Tribe consented to state jurisdiction;
- The South Dakota Supreme Court has acknowledged, in *South Dakota v. Spotted Horse*, 462 N.W.2d 463, 467 (S.D. 1990), that South Dakota does not have jurisdiction over Indian country, nor may the State exercise partial jurisdiction over the reservation portion of infrastructure such as highways that pass through tribal lands;
- The Tate Woglaka Offering is subject to the Service Agreement with the Tribe;
- The Tribe receives substantial benefits by participating in the deployment of the Tate Woglaka Offering, including direct financial proceeds, training and employment preferences;
- The Tate Woglaka Offering will be subject to the Oglala Sioux Tribe's regulatory authority. 17/

None of the commenters disputes these facts. The Petition also showed that South Dakota has relatively little regulatory interest in the Tate Woglaka Offering given that the Tate Woglaka Offering is limited to a geographic area consisting of the Pine Ridge Reservation, almost all of the subscribers will be Indians, the service and Service Agreement are governed by tribal law, and the

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17/ Petition at 10-16.

offering is a commercial mobile radio service (“CMRS”) over which state rate and entry regulation is preempted. 18/

**2. The FCC Should Not Defer to the SDPUC’s Refusal to Acknowledge Tribal Interests in the Tate Woglaka Offering**

In view of the foregoing, the Commission must reject suggestions by the opposing commenters who argue that the balancing favors SDPUC jurisdiction over the Tate Woglaka Offering. 19/ The opponents give little or no weight to the Oglala Sioux Tribe’s significant interests in improving telephone service, facilitating employment of its members, receiving revenue from the Tate Woglaka Offering, and regulating on-reservation telecommunications, 20/ while relying on inappropriate or irrelevant factors to give undue weight to the state’s interest. For example, Great Plains’ argument, that “[l]ack of state jurisdiction would not benefit tribal sovereignty because the Commission, not the tribal government, would then act

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18/ Petition at 15-16.

19/ Compare Great Plains at 6; SDPUC at 9-20; with CTIA at 2-3. Great Plains misconstrues the South Dakota Enabling Act and the Petition’s discussion of it, by arguing that Western Wireless’ reading of the Act would result in the state having no jurisdiction over the reservation portion of any carrier’s service no matter how widespread the carrier’s overall offering reaches. Great Plains at 5-6. This odd result (and that on the other side of the coin, *i.e.*, the state having jurisdiction over all on-reservation activities, regardless of their nature and the extent to which they are localized to solely or primarily the reservation) is avoided through use of the balancing analysis that both Western Wireless and the SDPUC agree must apply.

20/ See Oglala Sioux Tribe at 1 (“As a domestic sovereign, the Oglala Sioux Tribe has the inherent sovereign jurisdiction to regulate matters such as [the Tate Woglaka Offering] on our reservation.”).



on the application” 21/ overlooks the Oglala Sioux Tribe’s real interest here, which is not in designating ETCs (which it is powerless to do regardless of whether Section 214(e)(2) or Section 214(e)(6) applies), but rather in overseeing and promoting competitive telephone service directed to its members on the Reservation.

The SDPUC likewise pays short shrift to federal and tribal interests in its efforts to block the Oglala Sioux Tribe from gaining jurisdiction over the provision of any telecommunications on the Reservation. Relying primarily on *White Mountain Apache Tribe v. Bracker*, 22/ the SDPUC submits, erroneously, that there are insufficient federal and tribal interests in the provision of universal service under the Tate Woglaka Offering to merit FCC jurisdiction over the Pine Ridge Petition. In truth, however, federal involvement in the Tate Woglaka Offering is much more extensive than the SDPUC suggests. The federal government, including the FCC, has a long-standing trust relationship with Indian tribes, which the Commission has recently reaffirmed in the specific context of improving the state of reservation telecommunications. 23/ In addition, the Commission’s

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21/ Great Plains at 6; *see also id.* at 6 n.13 (“State, instead of FCC, designation of ETC status does not implicate the right of the tribe “to make its own laws and be governed by them”) (citing *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

22/ 448 U.S. 136 (1980).

23/ *See Tribal Policy Statement*, *supra* note 3.

pervasive and exclusive regulation of spectrum-based services, 24/ and its encouragement of wireless solutions to address low tribal telephone penetration, should play a significant role in any analysis under *White Mountain Apache* and other Indian law precedents. 25/

The SDPUC offers the misplaced argument that “Western Wireless points to no authority which suggests that the *White Mountain Apache* test is to be determined on the basis of a census,” and that that case “specifically warns against a mechanical test.” 26/ First, the *White Mountain Apache* case is not the only case which governs whether a state or a tribe has jurisdiction over reservation activities, and the Pine Ridge Petition and Crow Jurisdictional Supplement discuss a number

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24/ See, e.g., *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 320-21 (2nd Cir. 2000) (“statutory provisions [in Title III of the Communication Act] make it clear that Congress intended the FCC to possess exclusive authority over technical matters related to radio broadcasting” and “[t]his authority is embedded in the [ ] broad authority to develop a comprehensive national regulatory system governing telecommunications”) (citing *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 430 n. 6 (1963); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994); *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 219-20 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1934)); see also 47 U.S.C. § 301.

25/ Petition at 16 (“while Western Wireless’ status as a CMRS provider does not alone confer Section 214(e)(6) jurisdiction on the FCC, the state’s limited regulatory authority over wireless carriers pursuant to Section 332(c)(3) further shifts the balance of interests toward tribal and FCC jurisdiction”) (citing *Twelfth Report and Order*, 15 FCC Rcd at 12262-63, ¶¶ 109-10; 47 U.S.C. §§ 214(e)(6), 332(c)(3)); see also *Wireless Tribal Lands Order*, 15 FCC Rcd 11794; *Wireless Telecommunications Bureau Announces Availability of Bidding Credits For Providing Wireless Services To Qualifying Tribal Lands*, 15 FCC Rcd 18351 (2000).

26/ SDPUC at 19.

of leading Indian law cases that support Western Wireless' use of tribal demographics to support its jurisdictional showing. 27/ Second, Western Wireless does not contend that the overwhelmingly Native American population of the Pine Ridge Reservation is the only factor, or even the primary factor, that pushes the balance of interests toward tribal jurisdiction – it is merely one of several factors that tips the scale in the Tribe's favor. 28/ Finally, SDPUC's position is undermined by its own argument suggesting jurisdiction should remain with the state because not all of the 91.5% of the Pine Ridge Reservation population that is Native American are

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27/ See Petition at 8-17 & Appendix F (Opinion of Professor Richard Collins ("Collins Opinion")) at 3-4 (citing *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Montana v. U.S.*, 450 U.S. 544 (1981); *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980)); see also *South Dakota v. Bourland*, 508 U.S. 679, 694-95 (1993) (distinguishing tribal authority over members versus non-members); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987) (distinguishing state authority over members and non-members) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332 (1983)); see also *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) (discussing Indian tribes' criminal and civil jurisdiction over nonmembers, as distinguished from members); *id.* at 457 (cataloguing Supreme Court cases and activities falling within the *Montana v. U.S.* consensual relationship exception).

28/ See *supra* at 8-9. The SDPUC argues that, when examining the Indian or non-Indian status of Tate Woglaka customers, the critical measure is how many are members of the Oglala Sioux Tribe, as opposed to how many are Indians. SDPUC at 19 (citing *U.S. v. South Dakota*, 105 F.3d 1552, 1559-60 (8th Cir. 1997)). Western Wireless does not disagree with this assessment. However, the Pine Ridge Reservation has a Native American population of 91.5%. Virtually all of these Indians are likely Oglala Sioux, and the SDPUC provides no evidence supporting a different conclusion. Therefore, it would be fallacious to suggest that the customer base for the Tate Woglaka Offering is not sufficiently Oglala Sioux to support a finding by the FCC that only a relatively small percentage of Tate Woglaka customers will be those over whom the SDPUC has jurisdiction.

members of the Oglala Sioux Tribe. If the SDPUC truly believed that the percentage of Indians in the Tate Woglaka Offering customer base was of “questionable relevance,” the SDPUC would not have even raised whether enough of the 91.5% Native American population represents members of the Oglala Sioux Tribe.

The SDPUC also undervalues the Oglala Sioux Tribe’s interest in regulating the Tate Woglaka Offering. The Oglala Sioux Tribe has a strong interest in overseeing telecommunications service on the Pine Ridge Reservation, and in ensuring that competitive entry is directed toward improving the service there. 29/ In addition, the Tribe has a significant interest in enforcing its jurisdiction over contracts to which the Tribe and its members are parties, including not only the Tate Woglaka Service Agreement, but also the individual agreements between Western Wireless and its Oglala Sioux Tate Woglaka customers. 30/ Moreover, the

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29/ *Twelfth Report and Order*, 15 FCC Rcd at 12213-14, ¶ 5 (finding that “enhancing tribal communities’ access to telecommunications . . . increase[s] their access to education, commerce, government, and public services [and] the emergency, medical, employment, and other services they may need”); *id.* at 12225, ¶ 28 (“significantly lower-than-average incomes and subscribership levels of members of . . . Indian tribes warrant our immediate action to increase subscribership and improve access to telecommunications on tribal lands”); *see also id.* at 12214, ¶ 6 (noting *Tribal Policy Statement* was adopted in response to “requests of Indian tribal leaders”).

30/ *See* Collins Opinion at 2 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 137-44, *Montana v. U.S.*, 450 U.S. at 565 (carving out exception to displacement of tribal authority to regulate “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements”) (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959); *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980)).

Oglala Sioux Tribe has asserted in this proceeding its ability and significant interest with regard to regulatory oversight of the Tate Woglaka Offering, stating “we have established a Utilities Commission which has full rate and regulatory authority over all purveyors [and] Western Wireless has agreed, in writing, to abide by the Oglala Sioux Tribe Utilities Commission authority.” 31/

Next, after shortchanging the federal and tribal side of the scale, the SDPUC tries to put its thumb on the state side by suggesting that the tribal-state balancing should be influenced strongly in the state’s favor by the SDPUC’s allegedly extensive role in regulating telecommunications throughout South Dakota, including the counties that lie within the Pine Ridge Reservation. 32/ However, the SDPUC overstates its regulatory interest in overseeing the Tate Woglaka Offering, in that most of the state statutory and regulatory provisions it cites either pertain to its regulation of local exchange carriers and local exchange service, or are general, non-substantive provisions. 33/ The SDPUC’s reliance on its

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31/ Oglala Sioux Tribe, Attachment at 2.

32/ SDPUC at 12-17.

33/ *Id.* at 13-14, 16 (citing SDCL 49-31-77 (service quality standards for local exchange carriers); SDCL 49-31-85 (general nondiscrimination provision pertaining to SDPUC powers); SCDL 49-31-11 (nondiscrimination in provision or rates for service); ARSD 20:10:33, *et seq.* (quality of service for local exchange companies, switching, central office channel capacity, trunking capacity, leakage/loop resistance, loss-of-switch plans, central office alarms, access line service interruptions, non-disconnect for failure to pay non-local charges, etc.)). To the extent the SDPUC supports its position by an offhand reference to *Cheyenne River Sioux Tel. Auth. v. PUC*, 595 N.W.2d 604, 609 (S.D. 1999), SDPUC at 17-18, Western Wireless’ exten-

[footnote continues]

local exchange regulatory authority, however, has no bearing on its regulation of the Tate Woglaka Offering, which is one of Western Wireless' several CMRS offerings. <sup>34/</sup> In addition, it has been Western Wireless' experience that state commissions do not typically regulate service quality for CMRS providers, and one court has even ruled that they are preempted from doing so. <sup>35/</sup> Finally, the SDPUC's reference to its complaint process as a key reason for finding state rather

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sive prior discussion of that case, Petition at 16-17 n.27, more than adequately responds to the SDPUC's argument.

<sup>34/</sup> Western Wireless concurs with the SDPUC that the question of whether the WLL CPE used to provide the Tate Woglaka Offering renders it non-CMRS is squarely before the Commission in another proceeding. *Id.* at 15 (citing Public Notice, WT Docket No. 00-239, DA 00-2622 (rel. Nov. 21, 2000)). Notably, however, the FCC and a number of state commissions have issued ETC decisions that either explicitly found that Western Wireless' universal service offerings are CMRS, or implicitly accepted this result. *See, e.g., Wyoming ETC Petition, supra* note 4, ¶ 6 (citing *Twelfth Report and Order*, 15 FCC Rcd at 12272, ¶ 137); *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier*, PUC Docket Nos. 22289, 22295, SOAH Docket Nos. 473-00-1167, 473-00-1168, at Finding of Fact 82 (Tex. Pub. Util. Comm'n Oct. 2, 2000) ("*Texas ETC Order*"); *In the Matter Of GCC License Corporation's Petition for Designation as an Eligible Telecommunications Carrier*, Docket No. 99-GCCZ-156-ETC, Order #6 Granting Sprint PCS and Western Wireless ETC Designation in Non Rural Telephone Company Wire Centers, at 2-4 (Kan. Corp. Comm'n rel. Jan. 18, 2000); *Western Wireless Corp. v. Consolidated Tel. Coop., Inc.*, Case No. PU-1564-99-17, Findings of Fact, Conclusions of Law and Order (Aug. 31, 1999), *upheld on remand* (N.D. Pub. Serv. Comm'n Nov. 22, 2000).

<sup>35/</sup> *Bastien v. AT&T Wireless Servs.*, 205 F.3d 983 (7th Cir. 2000) (holding that claims in a complaint based on a carrier's insufficiencies vis-à-vis tower construction, location, and coverage, resulting in poor quality of service, implicated the carrier's entry and rates and were thus preempted).

than tribal jurisdiction here is exaggerated, 36/ given that Tate Woglaka customers also may lodge complaints with either the FCC or the Oglala Sioux Tribe.

All told, the Oglala Sioux Tribe and the FCC have a much stronger jurisdictional interest in the Tate Woglaka Offering than the opposing commenters would allow. 37/ The Commission should thus recognize its jurisdiction over the Pine Ridge Petition and grant Western Wireless ETC status for its provision of the Tate Woglaka Offering.

**B. The FCC Should Grant the Pine Ridge ETC Petition,  
Consistent with the *Twelfth Report and Order***

The Commission should reject the opposing commenters' effort to keep it from reaching the merits of the Pine Ridge Petition by claiming that Western Wireless' pending statewide ETC petition before the SDPUC requires dismissal of the Pine Ridge Petition under the *Twelfth Report and Order's* admonition that "a carrier may only avail itself of [the FCC's Section 214(e)(6) process for tribal land

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36/ See SDPUC at 17.

37/ Golden West makes the absurd argument that, where there is a sufficient tribal role and interest in a universal service offering on its reservation to warrant ETC designation under Section 214(e)(6) by the FCC, rather than the state commission, it "moots" the "important state role of determining whether the public interest permits designation of an additional ETC for an area served by a rural telephone" [*sic*]. Golden West at 10. Section 214(e)(6) explicitly calls for the FCC to make the same public interest finding when it designates ETCs. Moreover, in almost every case where a non-tribal carrier can make the necessary showing of a lack of state jurisdiction, it will have to have obtained the support, and likely the participation, of the tribe to be served, in which case the representative of the potentially affected "public" will have spoken as to its "interest." See also *infra*, Section III.B.

ETC petitions] when it has not initiated a designation proceeding before the affected state commission.” 38/ We demonstrated in the Pine Ridge Petition that the Tate Woglaka Offering differs substantially from Western Wireless’ proposed offering for the rest of South Dakota, in that (i) the Tate Woglaka Offering has been designed at the Tribe’s behest, with its input, and is targeted to the needs of the Reservation; (ii) the Tate Woglaka Offering is marked by substantial involvement, oversight and participation by the Tribe and is governed by the Tate Woglaka Service Agreement; (iii) the Tate Woglaka Offering confers substantial benefits on the Tribe in the form of revenue, training and employment preferences; and (iv) the Tate Woglaka Offering is available only in the geographically limited area of the Pine Ridge Reservation, under contracts that the parties have agreed are subject to Oglala Sioux jurisdiction. 39/ These key differences distinguish the Tate Woglaka Offering, which is subject to tribal and federal jurisdiction, from Western Wireless’ other offerings in South Dakota. As such, the Tate Woglaka Offering is sufficiently distinct to merit its own jurisdictional analysis – and separate treatment by the

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38/ *E.g.*, SDPUC at 3-4; NTCA at 2; SDITC at 7-11 (all citing *Twelfth Report and Order*, 15 FCC Rcd at 12268-69, ¶ 126).

39/ Petition at 13-15, 17-19. As such, Mount Rushmore is in error when it claims “Western Wireless is seeking to avoid a SDPUC determination of whether designation of a second ETC in the portions of the Reservation served by South Dakota rural telephone companies is in the public interest [and is seeking] a determination by the Commission . . . rather than the SDPUC.” Mount Rushmore at 4-5. Western Wireless still has to make a public interest showing to the SDPUC for the non-Reservation service areas of these companies.



FCC under Section 214(e)(6) – regardless of superficial similarities (having no jurisdictional significance) between the Tate Woglaka Offering and Western Wireless’ other service.

The opposing commenters miss this distinction. Instead, they argue that because Western Wireless uses the same type of technology and equipment to provide universal service and wireless offerings off the Reservation as it does for the Tate Woglaka Offering, the services are the same and the Pine Ridge Petition is barred by the pendency of Western Wireless’ SDPUC petition. 40/ However, neither the technology, equipment, features, nor customer perception of a service offering are significant characteristics for purposes of Section 214(e)(6) jurisdiction. 41/ Rather, the FCC must look to (i) whether the services are offered by a tribal, non-tribal or a mixed provider (and if mixed, the extent of tribal participation), (ii) the service’s geographic boundaries, (iii) the Indian or non-Indian status of its customers, and (iv) the governing law that controls the arrangement under which the service is offered. 42/ When the FCC has granted ETC status on tribal lands in the

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40/ SDPUC at 5; Golden West at 8-9; Great Plains at 4 (“Either the requirements to offer and advertise the supported services are met or they are not. The addition of . . . agreements with the tribal government does not change in any way the question of whether the offering is consistent with the minimum requirements of the Act and the Commission’s Rules.”).

41/ The only exception to this is the small role the CMRS nature of the Tate Woglaka Offering plays in jurisdictional analyses. *See* Petition at 16; *see also supra*, Section II.A.

past, it has relied on factors such as the tribe's role in the offering and, presumably, that the service was primarily limited to the subject reservations, not the equipment used to provide service. 43/ The same framework must apply here.

As such, the opponents' arguments, that FCC precedent requires dismissal of the Pine Ridge petition in view of Western Wireless' statewide petition at the SDPUC, are misplaced. For example, the opponents misguidedly suggest that the Commission's decision not to require tribal carriers designated by state commissions prior to adoption of Section 214(e)(6) to be re-designated has some bearing here. 44/ However, the fact that the FCC deemed it unnecessary to "re-designate" Cheyenne River Sioux Telephone – even if it would have had

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42/ In view of these factors serving as the governing criteria, Western Wireless strongly disagrees with Golden West's suggestion that the "management styles, hiring practices, workforce training and activities and choice of law provisions . . . that would not be perceived by a customer" are not significant in determining whether one of a carrier's universal service offerings differ from another for purposes of jurisdictional analyses. Golden West at 9.

43/ *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, CC Docket No. 96-45, Memorandum Opinion and Order, 13 FCC Rcd 22433 (1998) ("*Saddleback*"); *Designation of Fort Mojave Telecommunications, Inc., et al.*, AAD/USB File No. 98-28, Memorandum Opinion and Order, 13 FCC Rcd 4547 (1998) ("*Fort Mojave*").

44/ SDPUC at 8; SDITC at 12-13 (both citing *Twelfth Report and Order*, 15 FCC Rcd at 12276, ¶ 149 (deeming re-confirmation of Cheyenne River Sioux Tribe Telephone Authority ("Cheyenne River Sioux Telephone") ETC status unnecessary)).

jurisdiction to do so after the adoption of Section 214(e)(6) 45/ – has no bearing on whether the FCC can make a Section 214(e)(6) ETC designation for one of a carrier’s offerings while the carrier seeks ETC designation for a jurisdictionally distinct offering from a state commission.

Likewise, it is unavailing to compare Western Wireless to Smith Bagley, Inc. (“Smith Bagley”), whose ETC petition for the Navajo Reservation the FCC dismissed without prejudice in the *Twelfth Report and Order* due to the company’s concurrent filing of ETC petitions with the Arizona and New Mexico commissions. 46/ Smith Bagley was seeking designation for the identical offering before both the state commission and the FCC out of an abundance of caution until the FCC determined how it would treat non-tribally owned carriers seeking ETC designations for tribal lands. By contrast, Western Wireless has petitioned for ETC status before both the FCC and the SDPUC for *different* universal service offerings.

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45/ *Twelfth Report and Order* 15 FCC Rcd at 12276, ¶ 149 n.333 (citing *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, 12 FCC Rcd 22947, Public Notice (1997) (stating that “[a]ny carrier that is able to be or has already been designated as an [ETC] by a state commission is not required to receive such designation from the Commission,” presumably including those to which Section 214(e)(6) might apply)); see also *Saddleback* and *Fort Mojave*, *supra* note 43 (ETC designations by the FCC of tribal carriers identically situated with Cheyenne River Sioux Telephone).

46/ SDPUC at 7; Golden West at 6 (both citing *Twelfth Report and Order*, 15 FCC Rcd at 12274-75, ¶¶ 143-44).

As such, the Commission's prior treatment of Smith Bagley offers no guidance in the present case.

In sum, Western Wireless' Tate Woglaka Offering on the Pine Ridge Reservation differs in a jurisdictionally significant manner from its universal service offerings elsewhere in South Dakota. As such, the opposing commenters focus on the wrong aspects of the offering in their attempt to persuade the Commission to dismiss the Pine Ridge Petition based on the prohibition in the *Twelfth Report and Order* against a carrier filing ETC petitions for its universal service offering to tribal lands before both the FCC and a state commission. The Commission must therefore reject their arguments.

### **III. WESTERN WIRELESS SATISFIES ALL THE STATUTORY AND REGULATORY PREREQUISITES FOR ETC DESIGNATION**

The Pine Ridge Petition demonstrates that the Tate Woglaka Offering satisfies the technical and public interest requirements contained in Section 214(e) and the Commission's rules. <sup>47/</sup> Only SDITC argues that Western Wireless has not met the technical ETC requirements, but this argument is in conflict with various regulatory and judicial bodies that have held otherwise. On the other hand, several rural ILECs claim that granting the Pine Ridge Petition would not satisfy the public interest requirement for designating a competitive ETC in their service

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<sup>47/</sup> Petition at 19-29 (demonstrating compliance with 47 C.F.R. § 214(e)(1) and 47 C.F.R. §§ 54.101, *et seq.*).